

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules – Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service Amendment)	
of Parts 21 and 74 to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the)	WT Docket No. 02-68
Commission's Rules with Regard to Licensing in)	RM-9718
the Multipoint Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	

PETITION FOR RECONSIDERATION OR CLARIFICATION

Pursuant to Section 1.429 of the Commission's rules,¹ Choice Communications, LLC ("Choice") submits this petition for reconsideration or clarification of the *BRS/EBS Order* released in the above-captioned proceeding on July 29, 2004.²

¹ 47 C.F.R. § 1.429.

² See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, [FCC 04-135] (2004) ("*BRS/EBS Order*").

I. BACKGROUND

Since 1996, Choice, formerly known as Wireless World, LLC, and its predecessor, Antilles Wireless Cable, have provided a variety of television, telecommunications, information and other related services to both business and residential customers in the U.S. Virgin Islands.³ Choice holds several wireless licenses from the Federal Communications Commission (“FCC” or “Commission”), including multipoint distribution service (“MDS”) licenses and multichannel multipoint distribution service (“MMDS”) licenses in the E, F, and H blocks;⁴ LMDS licenses in the A block; paging licenses at 158.1 and 454.6 MHz, and SMR licenses in the 800 MHz band. In addition, Choice leases instructional television fixed service (“ITFS”) spectrum in the B and G blocks.⁵

Choice is the only commercial entity utilizing the MDS, MMDS or the ITFS spectrum in the U.S. Virgin Islands. Choice is licensed on all available MDS and MMDS frequencies, and leases ITFS channels. ITFS channels unused by Choice are unassigned and lay fallow. The MMDS and ITFS frequencies support wireless cable television, digital audio and high-speed Internet access in large parts of St. Thomas, St. John, and St. Croix.

Choice has invested in excess of \$30 million (including \$18 million of property, plant and equipment) to construct and expand a network that supports, among other services:

- Wireless digital multichannel video service⁶ and wireless broadband Internet service using Choice’s MMDS and MDS licenses and leased ITFS spectrum for Basic Trading Area (“BTA”) 491 and on unlicensed spectrum in the 2.4 GHz and 5.8 GHz bands; and

³ Choice is a wholly owned subsidiary of Atlantic Tele-Network, Inc.

⁴ As referenced herein, “MDS,” “MMDS,” and “BRS” (or Broadband Radio Service) may be used interchangeably.

⁵ As referenced herein, “ITFS” and “EBS” (or Educational Broadband Service) may be used interchangeably.

⁶ Choice offers customers up to 134 digital channels of video programming and an additional 56 digital channels of audio programming.

- Dial-up Internet service, through Choice’s own facilities and facilities leased at retail rates from Innovative Communications (“Innovative”), the incumbent local exchange carrier (“ILEC”) and local cable provider, among other services.⁷

In 2005, Choice will offer additional telecommunications services and near-line-of-site (“NLOS”) wireless broadband technology, which will increase the breadth and penetration of Choice products and enable Choice to compete with the ILEC.⁸ Presently Choice uses all available channels to the fullest extent possible through digitalization of all signals and aggressive compression ratios.⁹ The only other entity providing widespread video service in competition with Choice is Innovative, the dominant video service provider and the ILEC in the U.S. Virgin Islands.¹⁰

II. THE COMMISSION SHOULD ALLOW MVPD PROVIDERS SUCH AS CHOICE TO OPT OUT OF THE NEW BAND PLAN

As the owner and operator of a wireless multichannel video programming distribution (“MVPD”) system providing the only competitive alternative to cable television for consumers in the U.S. Virgin Islands and the largest Internet service provider (“ISP”) in the U.S. Virgin Islands, Choice, along with its subscribers, will be severely impacted by implementation of the

⁷ Innovative operates under the rural exemption from Section 251(c) of the Act, which otherwise would require Innovative to lease certain facilities to competitors at reduced rates. Choice leases over 50 T1s from Innovative at tariffed rates in order to route Choice dial-up customers to the Internet. Innovative does not offer DS3s or volume and term discounts.

⁸ There is no meaningful competition in local phone service in the U.S. Virgin Islands. Choice has requested designation as an eligible telecommunications carrier (“ETC”) for Universal Service Fund (“USF”) support to provide local telecommunications competition. That ETC request, and Choice’s business plan to roll out competitive telephony, rests on the operational foundation described herein.

⁹ In 2000 Choice digitalized and compressed its video signals system wide to offer customers improved picture quality and increased program selection. Until very recently, no other entity offered digital video in the market.

¹⁰ Innovative serves over 71,000 lines in the U.S. Virgin Islands and offers long distance, cellular and DSL service. In addition, Innovative owns the local newspaper with the largest circulation in the territory, the largest cable system in the U.S. Virgin Islands and a local cable TV station, among other properties. Innovative receives substantial Federal and local tax incentives as the local telephone utility.

new BRS/EBS band plan and the Commission’s decision not to allow certain MVPD providers to opt out of the transition to the new band plan. Having paid a substantial sum at auction for its Basic Trading Area (“BTA”) license to provide digital video, audio, and wireless broadband Internet services, Choice invested in excess of \$30 million dollars to construct a high-power MVPD system to deliver video services to the U.S. Virgin Islands, and subsequently to convert its system from analog to digital technology in order to permit full frequency reuse and deployment of wireless broadband Internet services. Choice today offers 134 digital channels of video programming and an additional 56 digital channels of audio programming to subscribers throughout the U.S. Virgin Islands. In addition, Choice offers wireless digital subscriber line (“WDSL”) service to residences and businesses that otherwise lack reliable broadband Internet service choices.¹¹

Because Choice is using all of its 13 licensed MDS and MMDS channels (along with additional leased ITFS channels) to provide digital video, audio, and wireless broadband Internet services, it has an immediate need for more spectrum to meet subscriber demand. Choice will be unable to deliver the same amount of programming, or any of its planned new services, using only the seven 6 MHz-wide mid-band segment (“MBS”) channels that the Commission allocated under the new band plan for high-power operations.

In addition, Choice’s WDSL service will be severely impacted by the elimination of MDS Channels 1 and 2, which are used for WDSL upstream communications.¹² Attempting to

¹¹ Choice also is actively seeking to enter the telephone business in the U.S. Virgin Islands as a competitive local exchange carrier to Innovative, the local phone monopoly, using the licenses and infrastructure it has deployed and plans to deploy in coming years.

¹² Choice has elected not to challenge this aspect of the *BRS/EBS Order*, but urges the Commission to consider the need for additional spectrum, and more flexible use of spectrum, in order to relocate MDS 1 and 2 operations with minimal disruption to customers and operations.

move WDSL operations into other spectrum available to Choice will create interference on the video channels and consume additional spectrum dedicated to video services. Therefore, a forced transition to the new band plan would require Choice to substantially reduce the number of program channels offered to subscribers and would significantly impair Choice's position as the only viable competitor to cable television in the U.S. Virgin Islands.

Despite the lack of record support for its decision, the Commission declined to adopt the proposal by the Coalition¹³ to allow MVPD providers to opt out of the transition if they either serve at least five percent of the households within their geographic service areas ("GSAs") or use more than seven MDS/ITFS channels to provide digital programming. In doing so, the Commission assumed that an opt-out provision is "unnecessary to protect MVPD licensees" and that "existing MVPD providers could be accommodated under the Transition Plan."¹⁴ The Commission, however, failed to explain how MVPD providers that fully and efficiently use more than seven MDS/ITFS channels to provide digital programming and broadband services can continue to deliver their existing services using only seven channels in the MBS. These MVPD providers, including Choice, simply cannot be accommodated under the new band plan without a loss in programming services, revenues, and subscribers. This loss will be particularly devastating for small MVPD providers like Choice that have invested substantial resources to construct state-of-the-art, digital MVPD systems that, in many cases, serve as the only competitive alternative to existing cable television systems in rural and insular areas of the United States. Over the years, Choice has made a substantial investment to deploy precisely the

¹³ The Coalition consists of the Wireless Communications Association International, Inc., the National ITFS Association, and the Catholic Television Network.

¹⁴ *BRS/EBS Order*, ¶ 76.

system encouraged by the FCC when it modified its MMDS and ITFS rules during the past decade to permit additional technical flexibility (*e.g.*, allowing licensees to employ digital technologies).¹⁵ The Commission's rules, and Choice's operation under those rules, succeeded in introducing competition and service improvements in a market where there might otherwise be none.¹⁶

In further support of its decision, the Commission states that allowing MVPD providers to opt out of the transition “may result in interference to licensees in neighboring population centers, which would prevent these neighboring locales from receiving wireless broadband services.”¹⁷ For remote and insular areas such as the U.S. Virgin Islands, however, the possibility of interference to neighboring markets is non-existent. Thus, at least as applied to the U.S. Virgin Islands, an opt-out provision would allow Choice to maintain and grow its MVPD business without impeding the development of new wireless broadband services in neighboring markets under the new band plan.

Although the *BRS/EBS Order* permits MVPD providers to seek a waiver on a case-by-case basis, this process is administratively burdensome and unwarranted. MVPD providers seeking a waiver are required under the *BRS/EBS Order* to provide a public interest showing, along with a demonstration of “why [they] cannot work within the transition rules” and a discussion of “the actions taken...to minimize the affect [sic] of interference on neighboring

¹⁵ See *Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18839 (1996); see also *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360 (1994); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998).

¹⁶ Choice's conversion to digital service has recently been matched by Innovative. Absent a digital competitor in the market it is unlikely Innovative would have felt any pressure to upgrade its system.

¹⁷ *Id.*

markets.”¹⁸ This detailed showing, however, is unnecessary particularly because the record demonstrates that MVPD providers that use more than seven digital channels cannot be accommodated under the new plan and that BRS/EBS operations in rural and insular markets such as the U.S. Virgin Islands have little or no risk of creating interference to neighboring markets. Choice maintains that administrative and operational efficiency would be served by the Commission adopting an “opt out and notify” process for any entity that meets the 5 percent or 7 channels test as demonstrated by subscriber or operational data.

III. EXISTING OPERATIONS ON REMOTE AND INSULAR AREAS SUCH AS THE U.S. VIRGIN ISLANDS SHOULD BE PERMITTED TO REMAIN AS IS, OR IF REQUIRED, TO TRANSITION ON A BTA BASIS

Choice urges the Commission to permit opt out markets to retain a BTA license area and require that transitions in insular areas occur on a BTA basis. In mandating that transitions to the new band plan occur on a Major Economic Area (“MEA”) basis, the Commission adopted a one-size-fits-all solution that is not suitable for remote and insular markets such as the U.S. Virgin Islands. Although the U.S. Virgin Islands and Puerto Rico are 45 miles apart and have significant language and cultural differences, both markets are deemed to be within the same MEA.¹⁹ As a result, a BRS/EBS licensee or lessee in Puerto Rico could force Choice and other licensees in the U.S. Virgin Islands to submit to a transition plan, even though BRS/EBS operations in the U.S. Virgin Islands have no effect on BRS/EBS operations in Puerto Rico.

The Commission’s objective in ensuring a “quicker and more even transition” to the new band plan is understandable.²⁰ However, requiring licensees in geographically disparate markets

¹⁸ *Id.* ¶ 77.

¹⁹ *See* 47 C.F.R. § 27.6.

²⁰ *BRS/EBS Order*, ¶ 82.

to cooperate in the same transition plan will delay, rather than expedite, the transition process and would have pernicious effects on BRS operations in the U.S. Virgin Islands..

IV. BRS AND EBS LICENSEES SHOULD BE PERMITTED TO SWAP CHANNELS WITHOUT REGARD TO EBS ELIGIBILITY RESTRICTIONS

In opt-out, transitioned, or transitioning markets where a few BRS and EBS licensees control all or the bulk of the BRS/EBS spectrum, those licensees should be permitted to exchange spectrum holdings with each other so as to preserve their existing high-power operations or for any other reasons. For example, if only one BRS licensee and one EBS licensee exist in a market, the licensees should be permitted to reach an agreement under which each licensee could maintain their existing operations by exchanging with the other a portion of spectrum that it otherwise would have received under the new plan. Thus, for example, rather than retaining the full G channel spectrum under the new band plan, an EBS licensee could choose to assign a portion of that spectrum to a BRS licensee in order to allow the BRS licensee to maintain its existing operations within that spectrum. In return, the BRS licensee could agree to assign a portion of its new F and H channel spectrum to the EBS licensee in order to allow the EBS licensee to maintain its existing operations within that spectrum.

This type of arrangement is consistent with the Commission's intent to establish transition rules that "permit licensees the flexibility to meet the demands of a particular market."²¹ The Commission noted that "licensees may offer low-power service in the MBS and high-power service in the LBS and UBS if the licensee can reach an agreement with neighboring licensees."²² Allowing BRS and EBS licensees to swap spectrum with each other is simply

²¹ *BRS/EBS Order* ¶ 72.

²² *Id.*

another method by which licensees can reach a mutually acceptable agreement to transition to the new band plan, while preserving their existing operations. In fact, the Commission recognized that “licensees operating in the same geographic area may wish to ‘swap’ or ‘trade’ spectrum with another licensee to be able to create paired spectrum or for some other reason.”²³ Because spectrum swaps allow BRS and EBS licensees to re-configure their spectrum holdings under the new band plan so as to preserve their existing operations, the Commission should not apply the EBS eligibility restrictions to these transactions.

V. CONCLUSION

Based on the foregoing, Choice urges the Commission to grant this petition.

Respectfully submitted,

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Date: January 10, 2005

²³ *Id.* ¶ 102.

CERTIFICATE OF SERVICE

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